No. 3623

United States Circuit Court of Appeals

For the Ninth Circuit

JOSEPH SPIESS,
Appellant,
vs.
PACIFIC MARINE IRON WORKS, a corporation, GEORGE H. STURGES and ROBERT B. STURGES, co-partners, doing business under the firm name and style of Sturges & Sturges, and SOMMARSTROM SHIPBUILDING COMPANY, a corporation,
Appellees.

Brief of Sommarstrom Shipbuilding Company

Upon Appeal from the District Court of the United States for the District of Oregon.

WM. P. LORD,
for Appellant,

CHARLES H. CAREY,
JAMES B. KERR,
CHARLES A. HART,
for Appellee,
Sommarstrom Shipbuilding Company.

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STATEMENT OF THE CASE

This is a libel *in personam* for personal injuries sustained by the appellant while at work on the steamship "Datis" as an employee of respondent, Sturges and Sturges. The libel named three respondents,—Pacific Marine Iron Works, a corporation, Sturges and Sturges, a co-partnership, and Sommarstrom Shipbuilding Company, a corporation, the appellee here. The Sommarstrom Com-

pany at once challenged the sufficiency of the libel as to it by exceptions which pointed out that the appellant was not its employee, nor was it charged with any duty or responsibility with respect to the appliance appellant was using when injured. The trial court sustained the position of the Sommarstrom Company and from the order of dismissal subsequently made, this appeal is taken.

After the court had sustained the Sommarstrom Company's exception, but before any order of dismissal had been entered, appellant made a settlement with the other respondents and a stipulation was filed reciting that "the above entitled cause and all suits or actions arising from the facts set forth in the libel * * * has been compromised and settled as between them and may be dismissed as to said named respondents with prejudice."

The order of dismissal which was entered upon this stipulation reads:

> "Ordered that the above entitled libel be dismissed with prejudice and without costs to the respondents, George H. Sturges and Robert B. Sturges and Pacific Marine Iron Works."

Subsequently and on May 18, 1920, an order of dismissal as to the Sommarstrom Company was entered and it is this order from which appellant has appealed to this court.

ARGUMENT

There are a number of difficulties in the way of a recovery by appellant against the Sommarstrom Company. Before discussing the objection that the libel contains nothing which would fasten responsibility upon the Sommarstrom Company—the only point argued in appellant's brief—we call attention to certain obstacles which, as we think, preclude any recovery from appellee.

1. Appellant assumes there is jurisdiction because the accident happened on the water, although appellant at the time was engaged in work non-maritime in character. But it is not at all certain that locality is the *exclusive* test of jurisdiction in matters of tort in admiralty. A workman engaged in ship construction, even after launching, is performing a non-maritime contract. *The Francis McDonald,* 41 Supreme Court 65, (decided December 6, 1920). The local law and not the maritime law governs the contract relation between master and servant in such work; and the tort growing out of that contract relation is not of a maritime nature and should not be cognizable in admiralty.

The particular point no doubt will be decided in *Grant Smith-Porter Ship Company v. Rohde,* certified by this court to the Supreme Court of the United States on April 5, 1920, the trial court's decision in which is reported in 263 Fed. at page 204. It may be, too, that in the case at

bar the record does not show clearly that appellant's work was ship construction; although the Sommarstrom Company's only relation to the matter grows out of its contract for the construction of the ship, (Record p. 7) and appellant when injured, was performing work delegated by the Sommarstrom Company to the Pacific Marine Iron Works, and by it to appellant's employers, Sturges and Sturges.

2. Appellant's theory is that the Sommarstrom Company, being in control of the ship, was responsible jointly with its subcontractors for their failure to fasten the gang plank through the falling of which appellant was injured. But the record shows that appellant, before the order of dismissal appealed from was made, compromised and settled his claim and "all suits or actions arising from the facts set forth in the libel," and following this settlement an order of dismissal with prejudice was entered reading as follows:

> "Ordered that the above entitled libel be dismissed with prejudice and without costs to the respondents George H. Sturges and Robert B. Sturges and Pacific Marine Iron Works.
>
> "Dated this 31st day of March, 1920."

If this order is to be interpreted as a voluntary dismissal with prejudice only as to Sturges and Sturges and the Pacific Marine Iron Works (and it does not so read) it left appellant with a suit not dismissed as to the Sommarstrom Company but with the alleged right of action settled and discharged.

It is elementary law that a person is entitled to only one satisfaction for a wrong, and that a release of one of several joint tort-feasors is a release of all. 27 Am. & Eng. Ann. Cas. 270. Indeed it is very doubtful if under any circumstances, through the device of a covenant not to sue or otherwise, there may be a reservation of the right to sue one of the joint tort-feasors with whom an agreement has not been made. Apparently no reservation was attempted, as the record indicates a settlement and a complete discharge of all rights of action. (Record p. 18).

An illustrative case is *The St. Cuthbert,* 157 Fed. 799, in which the libelant settled with his employers, a stevedoring concern, and then attempted to hold the vessel for his injuries, claiming a defective appliance belonging to the ship. The court said:

> "If the use of the rusty nail was an act of negligence, the steamship and the stevedores were joint tort-feasors. The steamship furnished it and the stevedores used it. But the proofs showed that the libelant has received satisfaction from the stevedores for the injury he complains of in the present libel and has given them a general release from all claims arising therefrom. The release of one joint tort-feasor releases all of them."

If the Sommarstrom Company was connected at all with appellant's mishap, its relation was that of a joint tort-feasor with Sturges and Sturges and Pacific Marine Iron Works. There was but one right of action, and it having been settled and dis-

charged, appellant has no right to complain of the dismissal of the Sommarstrom Company.

Passing these objections, we come to consider whether or not the trial court was right in determing that the Sommarstrom Company had no part in the responsibility for appellant's accident. Shortly stated, the claim of appellant is (1) that he was rightfully on the vessel, (2) that the vessel and those owning or controlling her were required to furnish safe appliances, (3) that the failure of Sturges and Sturges and Pacific Marine Iron Works to cleat or fasten the gang plank used was a failure to furnish a safe appliance; and (4) that the Sommarstrom Company was equally responsible with the other respondents for this delinquency.

Apparently the attempt is to bring the case within the rule of *Leathers v. Blessing,* 105 U. S. 626. This case like *Consolidated C. Company v. Conley,* 250 Fed. 679, cited by appellant, fastened responsibility upon a ship or its owners for failure to cover or guard a hatch. Upon analogous principles of common law (*Southern Pacific Co. v. Jensen,* 37 S. C. 524, 531) those in control of a ship owe a duty to persons coming on board rightfully, to see that there are no dangerous openings; and the rule has been extended to cases of workmen using appliances furnished by the ship. *Hughes on Admiralty,* 2nd Ed., Sec. 103.

While the brief does not say so, it may be in-

ferred that it is this doctrine of implied invitation appellant is seeking to invoke. Certainly there is no other conceivable theory upon which the Sommarstrom Company could be connected with the accident. It was not the man's employer and the work under way was not being done at its plant or with its tools or appliances. Unless through its subcontract with the Pacific Marine Iron Works and the contract of that company with Sturges and Sturges, the Sommarstrom Company may be said to have invited appellant on board the ship, intending that he should use the ship's appliances furnished for the work, there is no hypothesis upon which the Sommarstrom Company could be held.

A clear understanding of the facts will demonstrate the inapplicability of this theory. The Sommarstrom Company had a contract for the construction of the vessel. It sublet to the Pacific Marine Iron Works the interior work, and the latter company in turn contracted with appellant's employers for the installation of plumbing. When the time came for the interior work to be done, the vessel was moved from the Sommarstrom plant at Columbia City to the City of Portland, and was moored at the dock of the Pacific Marine Iron Works. Here the employees of that concern and of Sturges and Sturges were working at the time of the accident, and to enable them to pass back and forth a plank was stretched from the main deck of the vessel to

the dock. The deck of the steamship was about four feet higher than the floor of the dock, and the accident happened because the plank was not cleated or fastened to the deck of the vessel.

It is not claimed that the plank used was a ship's gang plank furnished by the Sommarstrom Company as a part of the ship's apparel. If that be assumed, there is no claim that the plank was insufficient or defective. The charge is that those who put it in place failed to fasten it to the deck of the ship. The Sommarstrom Company had nothing whatever to do with the means chosen by the Iron Works and Sturges and Sturges for getting their employees on and off the vessel. If any appliance of the ship was used, it was not a defective appliance, and there is nothing upon which the doctrine of *Leathers v. Blessing, supra,* and similar cases can rest.

It is true that the libel says (Record p. 8) that "the means of communication provided by *respondents* for their employees working on the said steamship 'Datis' to the aforesaid dock" was a plank as above described. But respondent, Sommarstrom Company, had no employees working there at the time; and the language used must be read in the light of the facts set out in the libel. The respondents, Pacific Marine Iron Works and Sturges and Sturges, were engaged in work at the time and their employees had occasion to go on the ship; and for

the use of these employees they furnished the plank in question. The accident happened because these respondents failed to make the plank fast, and not because of any neglect by the Sommarstrom Company in the construction of the ship or the furnishing of appliances.

The allegation of paragraph IV of the libel that the vessel was at all times "under the control of the respondents" also must be read in the light of the facts stated. It is quite obvious that the vessel while at the dock of the Pacific Marine Iron Works was not under the control of the Sommarstrom Company. The Sommarstrom Company was concerned in the matter because the work being done was covered by the general contract for the construction of the vessel, but it was not in any sense in the position of an employer as to appellant. At most the Sommarstrom Company stood in the same relation to the vessel as its owner, and the limit of its responsibility in this particular was not to furnish a safe place in which to work, (Record p. 10) but to refrain from furnishing defective appliances for the use of subcontractors and their employees.

This seems to be recognized by appellant's argument (Appellant's Brief p. 12) that "a proper gang plank is essentially a part of the ship's apparel" and that those operating her were under legal duty and obligation to provide proper appliances as a means to get on and off the ship. But the language

of the libel contains no suggestion that the gang plank "provided by respondents for their employees working on the said steamship 'Datis,'" if furnished at all by the Sommarstrom Company as one of the ship's appliances, was in any respect defective or insufficient. Whatever the fact may be as to where the plank came from, and whether it was a ship's gang plank or a board procured by the Pacific Marine Iron Works or Sturges and Sturges for temporary use, the charge of negligence had to do not with any defect or insufficiency, but with the failure to make the plank fast. The libel, after a reference to the danger from the rise and fall of the waters of the river says (Record p. 11):

> "That the safe and proper method to have been followed in fixing or placing said gang plank so that the same would have been safe to use as a means of ingress and egress under the existing physical conditions hereinbefore described, was to have lashed said gang plank with rope from the inboard side of the plank to ringbolts or deck bits on the inboard side of the steamship, or to have placed cleats under the gang plank."

The Sommarstrom Company had nothing to do with the obligation of appellant's employers to furnish a safe place in which to work. At most it was required to use care with respect to appliances intended for use by the employees of its subcontractors. It will not be presumed that the Sommarstrom Company had failed to provide such ropes

and such ring-bolts or deck bits as ordinarily are included in a ship's apparel; and the failure of the Pacific Marine Iron Works or Sturges and Sturges to use these and to fasten the plank cannot be made the basis of a charge of negligence against the Sommarstrom Company.

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